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Diljit Kaur a/p Puran Singh v Majlis Peguam Malaysia

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–22–1036 OF 2008
SU GEOK YIAM J
26 DECEMBER 2013

C *Legal Profession — Practice of law — Application for sijil annual — Sole-proprietor (plaintiff) sued Bar Council for damages for failing to issue her SA because she had not submitted accountant's report — Whether Bar Council acted properly — Whether requirement for accountant's report mandated by Legal Profession Act 1976 — Whether plaintiff failed to apply for exemption from* D *requirement — Whether plaintiff's reliance on 'legitimate expectation' she would be issued SA despite not submitting accountant's report untenable for being against public policy — Whether plaintiff failed to prove fact and quantum of alleged losses suffered from being denied SA or that she had been victimised or discriminated against — Whether res judicata/issue estoppel barred plaintiff from* E *re-litigating issues concerning SA conclusively determined in previous judgment of court*

The plaintiff was an advocate and solicitor of the High Court of Malaya. She began practising as a sole-proprietor in October 1998 and contended that she F was issued a *sijil* annual ('SA') by the defendant for the years 1999, 2000 and 2001 even though she did not submit an accountant's report when applying for the SA for those years because she had never maintained a client's account. When she made a similar application for the SA in 2002, the defendant refused to issue her one on the ground she had failed to submit an accountant's report G as was required by its Circular No 19/2001 issued to all lawyers. The requirement for submission of an accountant's report was mandated under s 79(1) of the Legal Profession Act 1976 ('LPA'), but an applicant for the SA could apply to the defendant for exemption from that requirement. Since the plaintiff was not issued with a SA for 2002, and consequently did not have a H certificate to practise ('PC') during that year, the defendant lodged a complaint with the disciplinary board under the LPA that she was carrying on practice without a valid PC. On being notified of that complaint, the plaintiff applied to the High Court ('the OS') for an order directing the defendant to issue her a SA for 2002. In response, the defendant sought a declaration that she was I carrying on practice illegally. The High Court dismissed the OS, holding that the defendant could not be compelled to issue her a SA because she had not only failed to submit an accountant's report as required by s 79 of the LPA but had also not obtained an exemption from that requirement. Although the plaintiff appealed to the Court of Appeal against that decision, her appeal was

struck out when she failed to attend the appeal hearing. Her application to have the appeal reinstated failed and she took no further steps to have the appeal revived. The plaintiff claimed the defendant had denied her of a SA for the years 2002 until 2006 and that she only obtained a SA for the year 2007. In late 2008, the plaintiff filed the instant suit claiming against the defendant, inter alia, exemplary damages for its 'oppressive behaviour' towards her, special damages for loss of earnings for being disallowed to practise as a lawyer for the five years she was denied of a SA, special damages for loss of opportunity to advance in her profession/career and for loss of interest on her savings and loss of use of her savings, and general damages for anxiety, distress and loss of self-esteem. The plaintiff alleged that the defendant's failure to issue her a SA for the relevant years was actuated by malice and was a pre-meditated and deliberate witch-hunt. In its defence, the defendant submitted that it had acted properly and within the law for not issuing the plaintiff a SA in 2002 and 2006. It said the plaintiff was issued a SA for 2007 because her application that year was in order. The defendant contended that the plaintiff was barred by res judicata and issue estoppel from revisiting or re-litigating in the instant suit the same issues that were canvassed before and determined by the High Court when it dismissed the OS. Since the decision in those proceedings stood unchallenged, it remained final and binding on the parties.

Held, dismissing the claim:

(1) Res judicata and issue estoppel barred the plaintiff from filing the instant suit against the defendant to claim for loss and damage allegedly suffered by her in respect of the defendant's refusal to issue her a *Sijil* Annual ('SA') for the year 2002 because with the dismissal of the plaintiff's OS by the High Court, its decision on the issue whether the defendant was entitled to refuse to issue the plaintiff a SA for the year 2002 and the issue whether it was entitled to request for an accountant's report from her became final and binding upon the parties (see paras 66 & 77).

(2) The evidence before the Court showed that the defendant was justified in not issuing the SA for the year 2002 because the plaintiff failed to submit an accountant's report as was expressly required by the defendant's circular No 19/2001. The plaintiff also did not apply to obtain an exemption of that requirement mandated by s 79(1) of the LPA (see paras 67–68).

(3) The evidence showed the plaintiff did not submit any application to the defendant for a SA for the years 2003, 2004 and 2005. For the year 2006, her application was not in order; hence, the defendant was justified in not issuing her a SA for 2006. As for the year 2007, the court found the plaintiff only applied for a SA in November of that year, and since her application was in order, she was issued a SA for that year (see paras 69–70).

(4) The court rejected the plaintiff's contention that she had a 'legitimate expectation' to be issued with a SA for the year 2002 on the alleged ground the defendant had issued her one for 1999, 2000 and 2001 without her having to submit an accountant's report. It was contrary to public policy to allow the plaintiff to rely upon the doctrine of legitimate expectation as the defendant was exercising a statutory power ie discretion, expressly conferred upon it by s 79(1) of the LPA and subsidiary legislation made thereunder ie rr 4, 4(i) and 6(1) of the Accountant's Report Rules when it required the plaintiff to submit an accountant's report for the SA applications in 2002 and 2006 (see paras 78, 123).

(5) The plaintiff had failed to prove the fact and the amount of her alleged losses. She had also failed to prove that she had been victimised or discriminated against by the defendant or that it had conducted itself in an oppressive manner towards her from 1998 until the year 2007. She had also failed to prove the defendant had acted wrongfully or with mala fides in refusing to issue her a SA for the relevant years or that its refusal was pre-meditated, deliberate and a witch-hunt or that it had intended to injure the plaintiff's reputation as a lawyer (see paras 140, 141 & 150).

[Bahasa Malaysia summary

Plaintif merupakan seorang peguamcara dan peguambela Mahkamah Tinggi Malaya. Beliau mula beramal sebagai pemilik tunggal pada Oktober 1998 dan menghujah bahawa sijil tahunan ('ST') beliau dikeluarkan oleh defendan untuk tahun 1999, 2000 dan 2001 walaupun dia tidak mengemukakan laporan akauntan apabila dia memohon untuk ST untuk tahun tersebut kerana dia tidak pernah mengekalkan akaun klien. Apabila dia membuat permohonan yang sama untuk ST pada 2002, defendan enggan untuk mengeluarkan kepadanya atas alasan dia gagal untuk mengemukakan satu laporan akauntan seperti yang diperlukan oleh pekeliling No 19/2001 yang dikeluarkan kepada semua peguam. Keperluan untuk permohonan laporan akauntan adalah dimandatkan di bawah s 79(1) Akta Profesion Undang-Undang 1976 ('APU'), tetapi seorang pemohon untuk ST boleh memohon untuk pengecualian daripada keperluan tersebut. Memandangkan plaintif tidak dikeluarkan dengan ST untuk tahun 2002, dan sehubungan dengan itu tidak memiliki sijil untuk beramal ('SA') pada tahun itu, defendan membuat satu aduan dengan lembaga disiplin di bawah APU bahawa plaintif terus beramal tanpa SA yang sah. Apabila dimaklumkan mengenai aduan tersebut, plaintif memohon kepada Mahkamah Tinggi ('SP') untuk satu perintah mengarahkan defendan untuk mengeluarkannya ST untuk tahun 2002. Sebagai balasan, defendan menuntut satu deklarasi bahawa dia beramal secara tidak sah. Mahkamah Tinggi menolak SP, memutuskan bahawa defendan tidak boleh dipaksa untuk mengeluarkan ST kepadanya kerana dia bukan sahaja gagal untuk mengemukakan laporan akauntan seperti yang diperlukan oleh s 79 APU

tetapi juga tidak mendapatkan pengecualian daripada keperluan tersebut. Walaupun perayu merayu kepada Mahkamah Rayuan terhadap keputusan tersebut, rayuannya ditolak apabila dia gagal menghadiri pendengaran rayuan. Permohonannya untuk rayuan tersebut dikembalikan gagal dan dia tidak mengambil langkah seterusnya untuk mengembalikan rayuan tersebut. Plaintif mendakwa defendan telah menafikan ST untuk tahun 2002 sehingga 2006 dan bahawa dia hanya memperoleh ST untuk tahun 2007. Pada penghujung tahun 2008, plaintif memfailkan guaman ini mendakwa terhadap defendan, antara lainnya, ganti rugi teladan untuk 'kelakuan menindas' defendan terhadapnya, ganti rugi khas untuk kehilangan pendapatan kerana tidak dibenarkan untuk beramal sebagai seorang peguam untuk tempoh lima tahun dia dinafikan ST, ganti rugi khas untuk kehilangan peluang untuk maju dalam profesion/kerjaya dan untuk kehilangan faedah ke atas simpanannya, kerugian menggunakan simpanannya dan ganti rugi am untuk kebimbangan, kerunsingan dan kehilangan harga diri. Plaintif mendakwa bahawa kegagalan defendan untuk mengeluarkan ST untuk tahun relevan tersebut didorong oleh busuk hati dan dirancang dan 'witch-hunt' yang disengajakan. Dalam pembelaannya, defendan menghujah bahawa dia telah bertindak sewajarnya dan dalam batasan undang-undang dengan tidak mengeluarkan plaintif ST pada tahun 2002 dan 2006. Defendan mengatakan bahawa plaintif dikeluarkan dengan ST pada tahun 2007 kerana permohonannya pada tahun tersebut adalah teratur. Defendan menegaskan bahawa plaintiff dihalang oleh res judicata dan isu estoppel daripada menyemak semula atau melitigasi semula guaman ini tentang isu yang sama yang telah dikemukakan di hadapan dan diputuskan oleh Mahkamah Tinggi apabila mahkamah menolak SP. Memandangkan keputusan dalam prosiding tersebut kekal tidak dicabar, keputusan tersebut kekal muktamad dan mengikat ke atas pihak-pihak.

Diputuskan, menolak tuntutan:

(1) Res judicata dan isu estoppel menghalang plaintif daripada memfailkan guaman ini terhadap defendan untuk menuntut terhadap kerugian dan ganti rugi yang didakwa dialaminya berhubung keengganan defendan untuk mengeluarkan Sijil Tahunan ('ST') kepadanya pada tahun 2002 kerana dengan penolakan SP plaintif oleh Mahkamah Tinggi, keputusan mahkamah ke atas isu sama ada defendan berhak untuk enggan mengeluarkan plaintif ST untuk tahun 2002 dan isu sama ada mahkamah berhak untuk meminta laporan akauntan daripadanya menjadi muktamad dan mengikat ke atas pihak-pihak (lihat perenggan 66 & 77).

(2) Keterangan di hadapan mahkamah menunjukkan bahawa defendan berkelakuan wajar dalam tidak mengeluarkan ST untuk tahun 2002 kerana plaintif gagal untuk mengemukakan laporan akauntan seperti yang diminta melalui pekeliling defendan No 19/2001. Plaintif juga tidak memohon untuk mendapatkan satu pengecualian terhadap

keperluan tersebut seperti yang dimandatkan oleh s 79(1) APU (lihat perenggan 67–68).

(3) Keterangan menunjukkan plaintif tidak mengemukakan apa-apa permohonan kepada defendan untuk ST untuk tahun 2003, 2004 dan 2005. Untuk tahun 2006, permohonannya tidak teratur, oleh itu defendan bertindak wajar dengan tidak mengeluarkan ST kepadanya untuk tahun 2006. Untuk tahun 2007, mahkamah mendapati plaintif hanya memohon ST pada November tahun tersebut dan memandangkan permohonannya teratur, dia diberikan ST untuk tahun tersebut (lihat perenggan 69–70).

(4) Mahkamah menolak hujahan plaintif bahawa dia mempunyai satu 'jangkaan sah' untuk dikeluarkan dengan ST untuk tahun 2002 atas alasan defendan telah mengeluarkan sijil tersebut untuk tahun 1999, 2000 dan 2001 tanpa dia perlu mengemukakan laporan akauntan. Ini bercanggah dengan polisi awam untuk membenarkan plaintif untuk bergantung atas doktrin jangkaan sah memandangkan defendan melaksanakan kuasa statutori iaitu pertimbangan, yang secara tersurat diberikan ke atasnya melalui s 79(1) APU dan perundangan subsidiari yang dibuat di bawahnya iaitu kaedah 4, 4(i) dan 6(1) Kaedah-Kaedah Laporan Akauntan apabila ia memerlukan plaintif untuk mengemukakan laporan akauntan untuk permohonan ST pada tahun 2002 dan 2006 (lihat perenggan 78, 123).

(5) Plaintif gagal untuk membuktikan fakta dan jumlah kerugian seperti yang didakwanya. Dia juga gagal untuk membuktikan bahawa dia telah dianiayai atau didiskriminasikan terhadap oleh defendan atau bahawa defendan telah bertindak dalam cara menindas terhadapnya sejak 1998 sehingga tahun 2007. Dia juga gagal untuk membuktikan bahawa defendan telah bertindak secara salah atau *mala fide* dengan enggan mengeluarkan ST untuk tahun tersebut atau bahawa keengganan tersebut dirancang, sengaja dan satu 'witch-hunt' atau bahawa dia bertujuan mencederakan reputasi plaintif sebagai seorang peguam (lihat perenggan 140, 141 & 150).]

Notes

For cases on application for sijil annual, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1668–1673.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2) & Ors [1967] 1 AC 853, HL (refd)

Chan Tuck Seng v Chan Lee @ Chan Kong Chai & Ors [2004] 3 MLJ 62, HC (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)
Datuk Ooi Han Eng & Anor v Soh Huang Siah (carrying on business through an organization known as Alaric's Productions Co) [2010] 5 MLJ 665, CA (refd)
Fauziah Khanom bt Irshad Ali Khan v Pegawai Pejabat Pelajaran Daerah Johor Bahru & Ors [2013] 7 MLJ 737 (refd)
Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeals [2009] 5 MLJ 449, CA (refd)
Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Hjh Maria @ Maryati bt Dalle (t/a Melati Kontraktor) v Majlis Perbandaran Tawau [2012] 3 MLJ 132, HC (refd)
Kasinathar Balendra Thuraisingam v Majlis Peguam Malaysia [2001] MLJU 415; [2001] 4 CLJ 160, HC (refd)
Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd & Ors [1991] 2 MLJ 258, HC (refd)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)
North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729, FC (refd)
North East Plantations Sdn Bhd v Pentadbir Tanah Daerah Dungun & Anor [2011] 2 CLJ 392, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133, HC (refd)
Satyadhyan Ghosel & Ors v Sint Deorajin Dobi and another AIR 1960 SC 941 (refd)
Yeap Seok Pen v Government of the State of Kelantan [1986] 1 MLJ 449, PC (refd)
Yip Shou Shan v Majlis Peguam [1994] 3 MLJ 82; [1994] 3 CLJ 150, SC (refd)

Legislation referred to

Accountant's Report Rules 1990 rr 4, 4(1), 6(1), (2), (3)(1), 8
Evidence Act 1950 ss 62, 64, 65, 101, 102
Government Proceedings Act 1956 s 29
Legal Profession Act 1976 ss 32(1)(c), (2), (4), 34, 41, 42, 47, 79(1), 99
Solicitors' Account Rules 1990 r 16

Diljit Kaur a/p Puran Singh in person for the plaintiff.
Ang Hean Leng (R Rishi with him) (Lee Hishamuddin Allen & Gledhill) for the defendant.

Su Geok Yiam J:

Background

[1] On 25 July 1991, the plaintiff was admitted as a barrister to the Bar of England and Wales.

[2] On 1 September 2005, the plaintiff was admitted as an advocate and solicitor of the High Court of Malaya.

[3] On 20 October 1998, the plaintiff set up her own legal firm under the name of Diljit & Co and practiced as a sole proprietor under that name.

[4] At the material time, the plaintiff was operating her legal firm under that name from her home.

[5] The defendant was set up under s 47 of the Legal Profession Act 1976 ('the Act') for the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions under the Act.

[6] The Malaysian Bar is a body corporate which was constituted under s 41 of the Act.

[7] The purpose of the Malaysian Bar as provided in s 42 of the Act is to, inter alia, represent, protect and assist members of the legal profession in Malaysia; to promote in any proper manner the interests of the legal profession in Malaysia; and to afford pecuniary or other assistance to members or former members of the Malaysian Bar.

[8] For the years 1999, 2000, and 2001, the plaintiff had applied for, and had been issued, the 'sijil annual' in Malay or the 'practising certificate' in English for each of those three years. For these three years, the plaintiff had complied with the Advocates and Solicitors (Issue of Sijil Annual) Rules 1978 and the Guidelines on Application for Sijil Annual (PU (A) 368 of 1978) issued by the defendant under s 32(2)(4) of the Act.

THE PLAINTIFF'S APPLICATION FOR THE SIJIL ANNUAL FOR THE YEAR 2002

[9] Hence, according to the plaintiff, she had a legitimate expectation that the same usual practice would be adopted by the defendant for her application for the *sijil* annual for the following year ie 2002, and that she would be issued the *sijil* annual for that year if she were to submit her application without

delivering an accountant's report as she neither had nor maintained a client account. A

[10] On 31 October 2001, the plaintiff applied for her *sijil* annual for the year 2002. According to the plaintiff, her application was a proper one as it was made in accordance with Circular No 19 of 2001 dated 1 June 2001 entitled 'Application for Sijil Annual/Practicing Certificate for the year 2002' which was issued by the defendant to all advocates and solicitors including the plaintiff. B

C

[11] According to the plaintiff, she followed her usual practice which she had adopted for the previous years in that she had, on 31 October 2001, personally handed over her application which was complete with all the supporting documents to the defendant within the time frame as stipulated by the defendant. The plaintiff also received an acknowledgment from the defendant that the latter had received her application. D

[12] However, according to the plaintiff, the defendant had breached its statutory duty under s 32(1) of the Act because the defendant did not issue to the plaintiff the *sijil* annual for the year 2002. The defendant also did not give to her any feedback concerning any information or other document which was required from the plaintiff. E

[13] Instead, on 6 February 2002, the plaintiff was shocked when she received a letter dated 4 February 2002 from one of the defendant's executive officers, Ms G Visahni accusing her of practicing illegally without a valid practicing certificate. It also asked her to give an explanation within 14 days as to why a complaint should not be lodged against her and injunction proceedings taken against her. F

G

[14] It further instructed her to take immediate steps to cease or close her practice and remove her signboard.

[15] The plaintiff replied to the letter dated 4 February 2002 within seven days ie on 14 February 2002. However, she heard nothing from the defendant. H

[16] On 7 March 2002, she wrote a reminder to the defendant concerning her application for her practicing certificate for the year 2002 coupled with a request for its issue by the defendant without further delay. I

[17] A month and a week later, the plaintiff received another letter from Ms G Visahni this time dated 21 March 2002. The letter asked her to deliver an

A accountant's report. The letter also enclosed another letter, allegedly, from the defendant dated 26 November 2001, for easy reference ('the letter dated 26 November 2001').

B **[18]** According to the plaintiff, the letter dated 26 November 2001 was not only ultra vires as it was not signed by the secretary of the defendant or a member appointed by the defendant for that purpose but was also a fabrication because she had never seen the enclosed letter before.

C **[19]** On 13 July 2002, after some futile exchanges of correspondences with the defendant, the plaintiff received a complaint No DB/02/0393 dated 4 July 2002 which was lodged against the plaintiff by Mr Mah Weng Kwai, the president of the defendant at the material time ('the defendant's complaint'), with the Advocates & Solicitors' Disciplinary Board ('the disciplinary board'). D It accused her of practicing illegally without a valid practicing certificate.

[20] Apart from the above, according to the plaintiff as pleaded in para 11 of her SOC, the defendant had also falsely and wrongly accused her of practicing unlawfully since 1998 until 2000. This was because on 4 April 1998, Cik Nor E Azmar Hanim bt Mokhtar, the defendant's executive officer, had deliberately and wrongfully accused her in writing of practicing illegally.

[21] Nevertheless, the defendant has neither supplied her with any F particulars in order to prove their accusations against her nor disclosed the identity of her accuser ie the complainant. This matter continued until the year 2000 when the then president of the defendant, namely, Tuan Hj Kuthubul Zaman Bukhari, threatened to commence disciplinary action against her, if necessary.

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[22] The defendant's unfair treatment of the plaintiff had been repeated by the defendant when it again accused her of practicing illegally in 2002.

[23] This has S32.S32 caused her to waste a considerable amount of her time H and energy in having to defend herself through numerous exchanges of correspondences with the defendant.

[24] This has also caused the plaintiff to inform the defendant that she felt victimised and discriminated against by the defendant.

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[25] As a result of the defendant's wrongful acts, the plaintiff's good reputation as a barrister and an advocate and solicitor has been injured. The plaintiff's health has been adversely affected. The plaintiff has suffered loss of

opportunity to advance in her profession and career. The plaintiff has also suffered severe anxiety and distress and loss of self-esteem.

ORIGINATING SUMMONS FILED BY THE PLAINTIFF AT THE KUALA LUMPUR HIGH COURT

[26] Hence, on 1 August 2002, the plaintiff (acting in person) filed an originating summons at the Kuala Lumpur High Court ie OS No R1–17–111 of 2002 ('the plaintiff's OS'), pursuant to s 34 of the Act, to seek an order from the High Court that the defendant be directed, ordered or compelled to issue the *sijil* annual for the year 2002 to her.

[27] On 2 August 2002, the defendant filed an originating summons at the Kuala Lumpur High Court ie OS No R1–17–121 ('the defendant's OS') to seek a declaration that the plaintiff was practicing illegally.

[28] On 30 October 2002, the defendant's complaint was heard by the Chairman of the Advocates & Solicitors' Disciplinary Board and adjourned *sine die.*

[29] On 13 November 2002, the Kuala Lumpur High Court which heard the plaintiff's OS dismissed it.

[30] Being dissatisfied with the dismissal of her OS by the Kuala Lumpur High Court, the plaintiff filed a notice of appeal ie Kuala Lumpur High Court Appeal No W-02–976 of 2002 dated 11 December 2002 ('the plaintiff's appeal') to the Court of Appeal ('COA').

[31] According to the plaintiff, the defendant had also wrongfully failed to issue to her the *sijil* annual for each of the subsequent years from 2003–2007.

[32] For the year 2004, the plaintiff attempted to apply for the *sijil* annual by giving a notice under s 33 (2) of the Act but upon the expiration of the period stated in her notice, she was asked by Ms G Visahini, the defendant's executive officer, to deliver the accountant's reports for certain years which according to the plaintiff were irrelevant.

[33] For the year 2007, the plaintiff had attempted to apply for the *sijil* annual by submitting her application on 27 July 2006 but she was asked to submit various statutory declarations. According to the plaintiff, the request was made purely on the defendant's whims and fancies.

[34] It was only on 19 November 2007 that the plaintiff was issued the *sijil*

annual for the year 2007 by the defendant.

[35] Therefore, the plaintiff has alleged that the defendant has acted contrary to s 42 of the Act because instead of looking after the rights and welfare of the members of the Malaysian Bar the defendant has done the opposite and in the process the defendant had prejudiced the plaintiff's livelihood and quality of life.

[36] The wrongful acts of the defendant have caused the plaintiff to suffer the loss of her livelihood as she had not been able to practice as an advocate and solicitor for six years ie from 2002 to 2007.

THE PLAINTIFF'S SUIT

[37] Hence, on 11 November 2008, based on the refusal, neglect and/or failure of the defendant to issue to her, within the 21 days period as stipulated in s 32(1) of the Act, the *sijil* annual for the year 2002 and the subsequent years ie 2003–2007, the plaintiff filed this suit vide a writ of summons and a statement of claim ('SOC') against the defendant.

[38] In para 18 of her SOC the plaintiff has claimed for exemplary damages based on the defendant's oppressive behavior.

[39] In para 19 of her SOC, the plaintiff has claimed for the following reliefs:

(a) special damages for loss of earnings for about five years (from January 2002 until 17 November 2007) by virtue of being prevented from practicing as a sole proprietor and/or an advocate and solicitor for the years 2002 until 19 November 2007;

(b) special damages for loss of opportunity to advance in her profession and career;

(c) general damages for anxiety and distress and loss of self-esteem;

(d) special damages for loss of interest on her savings and loss of use of her savings;

(e) interest;

(f) costs; and

(g) any order or other relief which this court deems fit and just in the circumstances of this case.

THE PLAINTIFF'S PLEADED CASE

[40] The plaintiff's pleaded case is, briefly, as follows:

[41] The plaintiff was entitled to be issued the *sijil* annual for the year 2002 and for the subsequent years under the Act but the defendant had wrongfully, with mala fides and without bona fide, refused to issue to her the *sijil* annual for the years 2002–2007.

[42] The refusal of the defendant to issue to her the *sijil* annual for the years 2002–2007 was not only wrongful but was also pre-meditated, deliberate and a witch hunt.

[43] Consequently, the plaintiff has suffered loss and damage because she could not practice her profession as an advocate and solicitor for those six years.

THE DEFENDANT'S PLEADED CASE

[44] The defendant's pleaded case is, briefly, as follows:

[45] The plaintiff's suit ought to be dismissed because the plaintiff is not entitled to the reliefs claimed based on the following grounds.

[46] The defendant acted properly in not issuing to the plaintiff the '*sijil* annual' for the year 2002 because the plaintiff's application was not properly made as she did not deliver to the defendant an accountant's report together with her application as mandated by Circular No 19 of 2001 issued by the defendant and by s 32(1)(c) and s 79 of the Act.

[47] The plaintiff did not obtain an exemption from the mandatory requirement to deliver an accountant's report prior to submitting her application.

[48] The same applied to her applications for the *sijil* annual for the years 2003–2006 ('the five subsequent years').

[49] The plaintiff did not challenge the defendant's refusal to issue her the *sijil* annual for each of the five subsequent years by way of an application under s 34 of the Act.

[50] As for the year 2007, since the plaintiff's application was in order, the defendant had issued to the plaintiff the *sijil* annual for that year.

[51] Be that as it may, according to the defendant, since the plaintiff's OS was dismissed by the Kuala Lumpur High Court on 13 November 2002; the plaintiff's appeal to the COA against the dismissal of her OS was struck out with costs due to her absence in the COA on 30 November 2009 for the hearing of her appeal; the plaintiff's motion which was filed by the plaintiff on 14 January 2013 to reinstate her appeal was dismissed by the COA on12 March 2013 after a hearing; and the plaintiff has not taken any further step thereafter to revive her appeal in the COA; the High Court judgment has become final and binding upon the parties.

[52] Therefore, the plaintiff is precluded by the doctrines of res judicata and issue estoppel from raising and re-litigating the same issues before this court.

[53] Apart from the above, the plaintiff's other allegations of impropriety on the part of the defendant are denied.

[54] The plaintiff is also required to prove her allegations that she has been victimised and was subjected to a witch hunt by the defendant; that the defendant had acted mala fides and ultra vires towards her; and that she has suffered the losses as claimed by her in her SOC.

THE FULL TRIAL

[55] The full trial of the plaintiff's suit commenced on 30 October 2012 and was completed on the same day.

[56] The parties called two witnesses, altogether.

[57] The plaintiff called one witness, namely, herself, as PW1.

[58] The defendant also called 1 witness, namely, Mr Woon Yeow Thong, as 'DW1'. DW1 is an advocate and solicitor. He is the secretary of the defendant.

ISSUES FOR THE DETERMINATION OF THE COURT

[59] There are eight issues for the determination of the court based on the points raised by the plaintiff and the defendant in their submissions before this court.

[60] The eight issues are as follows:

(a) whether the doctrines of res judicata and issue estoppel are applicable to bar the plaintiff's present suit in respect of the defendant's refusal to issue to the plaintiff the *sijil* annual for the year 2002?

(b) whether Circular No 19 of 2001 mandates the delivery of an accountant's report?

(c) whether there was any waiver by the defendant of s 79(1) of the Act?

(d) whether there was a legitimate expectation on the plaintiff's part that she would be issued a *sijil* annual for the year 2002?

(e) whether the defendant had victimised the plaintiff, discriminated against the plaintiff, subjected the plaintiff to a witch hunt; had conducted itself in an oppressive manner towards her from the year 1998 onwards until the year 2007; and had acted wrongfully with mala fide, pre-meditation and lack of bona fides, when it refused to issue to the plaintiff the *sijil* annual for the year 2002?

(f) whether it is for the defendant to prove that it had acted properly when it refused to issue to the plaintiff the *sijil* annual 2002?

(g) whether there was any wrongful act or failure to comply with the Act on the part of the defendant in relation to the non-issuance of the *sijil* annual to the plaintiff for the years 2003–2006 and the issuance of the *sijil* annual to the plaintiff for the year 2007?

(h) whether the plaintiff has proven the loss and damage as claimed in the plaintiff's SOC?

DECISION OF THE COURT

[61] On 14 August 2013, the court agreed with and accepted the submissions of and the authorities cited by Mr Ang Hean Leng, learned counsel for the defendant, in support of his submissions that the plaintiff was estopped from re-agitating and re-litigating the refusal of the defendant to issue to her the *sijil* annual for the year 2002 and that the plaintiff's claims which were anchored on that ground and that the plaintiff's claims for loss and damage allegedly suffered by her in respect of the defendant's alleged oppressive conduct towards her in victimising her and subjecting her to a witch hunt from 1998–2002 ought to be dismissed based on the doctrines of res judicata and issue estoppel.

[62] As for the plaintiff's claim for loss and damage allegedly suffered by her in respect of the refusal of the defendant to issue to her the *sijil* annual for the years 2003–2007, the court agreed with and accepted the submissions of and the authorities cited by Mr Ang Hean Leng, learned counsel for the defendant, in support of his submissions that the plaintiff had failed to prove her claims against the defendant on a balance of probability.

A **[63]** The court, consequently, dismissed the plaintiff's claims against the defendant, for loss and damage allegedly suffered by her for the years 2002–2007, with no order as to costs.

B **[64]** Being dissatisfied with the decision of the court, the plaintiff has filed a notice of appeal to the COA against the decision of the court.

REASONS FOR THE DECISION OF THE COURT

C **[65]** The reasons why the court decided in that manners are, briefly, as follows:

D **[66]** The doctrines of res judicata and issue estoppel bar the plaintiff from filing the present suit against the defendant to claim for loss and damage allegedly suffered by the plaintiff in respect of the refusal of the defendant to issue to the plaintiff the *sijil* annual for the year 2002 because the decision of the High Court in the plaintiff's OS has become final and binding on the plaintiff.

E **[67]** Be that as it may, the evidence before the court in the present suit showed that the defendant was justified in not issuing to the plaintiff the *sijil* annual for the year 2002 because the plaintiff had failed to comply with the condition precedent for the issuance by the defendant to her of the *sijil* annual for the year 2002.

F **[68]** The defendant's Circular No 19 of 2001 expressly requires the plaintiff to deliver an accountant's report to the defendant. However, it was unfortunate that the plaintiff neither delivered an accountant's report to the defendant nor made any application to the defendant to obtain an exemption of that mandatory requirement.

G **[69]** Based on the evidence before the court, the court found that the plaintiff did not submit any application to the defendant for the issuance to her of the *sijil* annual for the years 2003, 2004 and 2005.

H **[70]** For the year 2006, the plaintiff did submit an application to the defendant for the *sijil* annual but the plaintiff's application was not in order. Hence, the defendant was justified in not issuing to the plaintiff the '*sijil* annual' for that year.

I **[71]** For the year 2007, the court found that the plaintiff had only applied to the defendant for her *sijil* annual for that year in the month of November of that year contrary to her pleaded case. Nevertheless, since her application was in order as per the requirements of Circular No 19 of 2001, the defendant had

duly issued to the plaintiff a *sijil* annual for that year. A

[72] In relation to the defendant's refusal to issue her a *sijil* annual for the years 2002 and 2006, the court was satisfied that the plaintiff has failed to prove mala fide and the lack of bona fides on the part of the defendant. B

[73] Be that as it may, the plaintiff has also failed to prove the fact and the amount of her losses.

[74] Therefore, the plaintiff's present suit against the defendant ought to be dismissed. C

Issue (1)

[75] On this issue, the court agreed with and accepted the defendant's submissions that this issue ought to be decided in the affirmative in favour of the defendant and against the plaintiff. D

[76] In my judgment, the judgment of the High Court in the plaintiff's OS proceedings ('that High Court') has become final and binding upon the parties as the plaintiff's appeal against the decision of that High Court is no longer pending at the COA for the following reasons: E

(a) on 30 November 2009, the appeal was struck out with costs due to the failure of the plaintiff to appear before the COA to prosecute her appeal; F

(b) on 12 March 2013, the plaintiff's motion to re-instate her appeal was dismissed by the COA after a hearing before the COA in which the plaintiff was present; and

(c) thereafter, there was no further step taken by the plaintiff to re-instate or to revive her appeal. G

[77] Therefore, in my judgment, the doctrines of res judicata and issue estoppel are applicable because the decision of that High Court on the issue whether the defendant was entitled to refuse to issue to the plaintiff the '*sijil* annual' for the year 2002 has already become final and binding upon the parties and the issue whether the defendant is entitled to request for an accountant's report from the plaintiff has also become final and binding upon the parties in respect of the plaintiff's application for the *sijil* annual for the year 2002. H I

[78] In arriving at this conclusion, the court had rejected the plaintiff's contentions that she is not estopped from re-litigating the defendant's refusal to issue to her the *sijil* annual for the year 2002 because this court is not bound by

A the decision of that High Court as this court is a court of co-ordinate jurisdiction with that High Court. The plaintiff had argued that, therefore, the doctrine of stare decisis is inapplicable and this court is not bound by the decision of that High Court because the decision of that High Court was given per incuriam.

B

[79] Hence, based on her argument, this court being a court of co-ordinate jurisdiction with that High Court which had decided the plaintiff's OS, this court could ignore the judgment in the plaintiff's OS proceedings and arrive at a finding and decision which contradict the finding and decision of that High Court.

C

[80] The court also noted that in essence, the plaintiff, in her OS and in the affidavits affirmed by her to support her OS, and in her written submissions had contended as follows:

D

(a) the defendant had failed on various occasions to respond to her requests for information or documents;

(b) a letter which was signed by G Visahini, the executive officer of the defendant, requiring her to act in a certain way was invalid on the ground of ultra vires, as it should have been signed on behalf of the defendant by the secretary of the defendant or a member of the defendant who was appointed to do that;

E

F

(c) in the year 1998, one of the defendant's executive officers, had accused her of practicing illegally even though she had informed the defendant that she had ceased practice and hence the refusal of the defendant to issue her the *sijil* annual for the year 2002 was pre-meditated;

(d) in refusing to issue her the *sijil* annual for the year 2002, the defendant had acted without bona fides and the defendant's attitude towards the plaintiff was mala fide;

G

(e) the defendant had accepted the plaintiff's previous years' *sijil* annual applications without an acccountant's report, and should, therefore, not depart from the previous practice;

H

(f) the defendant's notes on application for *sijil* annual for the year 2002 issued to the plaintiff in 2001 did not provide a specimen of the accountant's report in cases where no client accounts are maintained;

I

(g) the plaintiff did not receive a valid Notice from the defendant pursuant to r 8 of the Accountant's Report Rules 1990 ('ARR') and r 16 of the Solicitors' Account Rules 1990 ('SAR');

(h) the plaintiff had, vide her letter of 22 March 2002 enquired of the defendant's executive officer as to who had directed her ie the

defendant's executive officer, to act as she did but the plaintiff received no response from her to the plaintiff's letter; the plaintiff had complied with the relevant rules and the procedures laid down by the defendant; and

(i) therefore, the *sijil* annual for the year 2002 should have been issued to the plaintiff within 21 days of the filing of her application pursuant to s 32(1) of the Act.

[81] This court also noted that that High Court had identified the core issue in the plaintiff's OS as follows:

[82] Whether in the circumstances of the case, the defendant should be directed or ordered or compelled to issue a *sijil* annual for the year 2002 to the plaintiff?

[83] However, that High Court had found as follows:

(a) the plaintiff was not entitled to be issued with a *sijil* annual for the year 2002 because she had failed to deliver an accountant's report or certificate to the defendant in non-compliance with s 79 of the Act;

(b) the plaintiff did not obtain an exemption from having to deliver an accountant's report to the defendant; and

(c) in the circumstances of that case, the defendant could not and should not be compelled, directed or ordered to issue a *sijil* annual for the year 2002 to the plaintiff.

[84] This court further noted that it was against the decision and findings of that High Court as set out above that the plaintiff, being dissatisfied and aggrieved, filed a notice of appeal to the COA ('the plaintiff's appeal').

Doctrine of res judicata, doctrine of issue estoppel and doctrine of stare decisis

[85] I shall now deal with the doctrine of res judicata, the doctrine of issue estoppel and the doctrine of stare decisis since these three doctrines have been raised by both parties in their respective submissions to support their respective contentions.

[86] In this regard, it was apparent to this court that the plaintiff had mistaken the doctrine of res judicata and the doctrine of issue estoppel for the doctrine of stare decisis, which, in my judgment, is not applicable at all in this case.

[87] My reasons are as follows:

[88] The former two doctrines relate to the principle of law that an issue that has been definitively settled by judicial decision cannot be relitigated. It is described as follows in *Black's Law Dictionary*, (9th Ed), at p 1425:

> An 'affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. Restatement (Second) of Judgments SS17, 24 (1982) — Also termed res adjudicata; claim preclusion; doctrine of res judicata. CF. COLLATERAL ESTOPPEL. [Cases judgment 540, 584, 984(1)].
>
> 'Res judicata' has been used in this section as a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgment. The first is the effect of foreclosing any litigation of matters that never have been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated, has gone under the name, 'true res judicata,' or the names, 'merger' and 'bar'. The second doctrine, preclusion of matters that have once been decided, has usually been called 'collateral estoppel'. Professor Allan Vestal has long argued for the use of the names 'claim preclusion' and 'issue preclusion' for these two doctrines [*Vestal, Rationale of Preclusion*, 9 St Louis U.L.J 29 (1964)], and this usage is increasingly employed by the courts as it is by Restatement Second of Judgments'. Charles Alan Wright, *The Law of Federal Courts S100A*, at 722–23 (5th Ed 1994).

[89] The latter doctrine ie doctrine of stare decisis, relates to the doctrine of precedent under which a court must follow earlier judicial decisions when the same points arise again in litigation (see *Black's Law Dictionary*, (9th Ed) at p 1537).

[90] The following excerpt taken from the same page is relevant:

> The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point of principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessary involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.' William M Lile et al. Brief Making and the Use of Law Books 321 (3rd Ed 1914).
>
> 'The general orthodox interpretation of stare decisis is stare rationibus decidendis ('keep to the rationes decidendi of past cases'), but a narrower and more literal interpretation is sometimes employed. To appreciate this narrower interpretation it is necessary to refer ... to Lord Halsbury's assertion that a case is only authority for what it actually decides. We saw that situations can arise in which all that is binding

is the decision. According to Lord Reid, such a situation arises when the ratio decidendi of a previous case is obscure, out of accord with authority or established principle, or too broadly expressed.' Rupert Cross & JW Harris, *Precedent in English Law* 100–01 (4th Ed 1991).

[91] The principle that inferior courts are not bound to follow by way of precedent, the decisions that were made per incuriam by a superior court is inapplicable to the instant case. This principle is also known as the per incuriam principle. It is not a defence to the doctrine of res judicata. This principle relates to judicial decisions which have been wrongly decided. It is one exception to the rule of stare decisis.

[92] The term 'per incuriam' is described as follows in *Black's Law Dictionary*, (9th Ed) at p 1254:

(Of a judicial decision) wrongly decided, usu. because the judge or judges were ill-informed about the applicable law.

'There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow nor indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam: thus, it has no authority The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked.' Louis Philippe Pigeon, Drafting and Interpreting Legislation 60 (1998).

'As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurance.' Rupert Cross & JW Harris, *Precedent in English Law* 149 (4th Ed 1991).

[93] Based on the meanings assigned to the expressions 'res judicata', 'per incuriam' and 'stare decisis' as set out above, it is clear that the legal principles

A contained in the two doctrines ie the doctrine of res judicata and the doctrine of stare decisis, are wholly different because they are actually based on different concepts in the law.

B **[94]** Hence, the court agreed with and accepted the defendant's submissions that the misconceived notion put forward by the plaintiff to this court ie that this court could override the judgment of that High Court merely because this court is of co-ordinate jurisdiction with that High Court, would go against the very premise of the doctrines of res judicata and issue estoppel, thereby allowing a litigant to re-litigate an issue already decided by a court of law and C in the process open the floodgates to never ending litigation. This is because every unsuccessful litigant would then invariably contend that the judicial decision made earlier against the litigant had been wrongly decided.

D **[95]** In the instant case, bearing in mind that the parties in the plaintiff's OS are also the same parties in the instant case and the plaintiff is also raising the same issue before this court, the doctrines of res judicata and issue estoppel are, undoubtedly, applicable to estop or bar or prohibit the plaintiff from re-opening and re-agitating the same issue in this suit because the plaintiff's E appeal at the COA is no longer pending resulting in the matter becoming final and binding as between the parties in the plaintiff's OS.

[96] I noted that at no point in time did the plaintiff dispute that the issue F that was raised by her in her OS is the same issue she has raised in the instant case ie that the defendant was not entitled or justified to refuse to issue to her the *sijil* annual for the year 2002.

[97] In my view, the plaintiff's submission that the judgment of that High G Court was made per incuriam was baseless and untenable. This is because I was of the respectful view that the learned High Court judge who heard the plaintiff's OS had taken into account all the relevant facts and the applicable law in arriving at the following decision as pleaded in the defendant's amended statement of defence:

H (a) the plaintiff is not entitled to be issued the *sijil* annual for the year 2002 because she had breached s 79 of the Act by failing to submit to the defendant an accountant's report;

(b) the plaintiff is not entitled to an automatic exemption from the I requirement under r 6(2) of the ARR;

(c) the plaintiff failed to comply with the requirement in r 6(3)(1) of the ARR in order to entitle her to an exemption from submitting an accountant's report;

(d) therefore, as the plaintiff was not exempted from submitting an accountant's report, the defendant could not be compelled, directed or ordered to issue the *sijil* annual for the year 2002 to the plaintiff.

[98] In this regard, the following excerpt in the decision of the then Supreme Court in *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 at pp 36–37 is relevant and binding on this court based on the doctrine of stare decisis.

[99] It gives the following guidance to an inferior court in deciding whether an earlier judgment of the Supreme Court was made per incuriam:

> It is submitted by the learned Attorney-General that the judgment of the Supreme Court (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) dated August 25, 1987 was made per incuriam. The per incuriam doctrine has been explained and restated by Sir John Donaldson MR in a recent case of *Duke v Reliance Systems Ltd* [1987] 2 WLR 1225 in the following words:
>
> > I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived to-day.
>
> In my opinion, the submission based on per incuriam is misconceived in that when the Supreme Court delivered the judgment on August 25, 1987 it was made after hearing arguments from the learned senior federal counsel representing the Government of Malaysia, learned counsel acting for UEM and learned counsel appearing for Lim Kit Siang. *It seems to me that the Supreme Court had considered all the arguments, authorities and statutes relevant to the case and the learned Attorney-General is unable to point to any particular ordinance or binding authority which had inadvertently been disregarded by the Supreme Court except to show that he disagreed with the interpretation of the scope of s 29 of the Government Proceedings Act 1956 given to it by the learned judges of the Supreme Court and the decision of the Supreme Court that on the facts of this case the respondent clearly had the locus standi to bring this suit*. In my opinion, the learned Attorney-General therefore fails to bring his case within the per incuriam rule as stated by Sir John Donaldson MR in the abovementioned case.
>
> (Emphasis added.)

[100] The following cases on the doctrines of res judicata and issue estoppel are also relevant, applicable to the facts of the instant case and binding on this court based on the doctrine of stare decisis:

[101] The Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti*

Sdn Bhd [1995] 3 MLJ 189 held as follows at p 197h:

> *What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation* — interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action — nemo debet bis vexari pro.
>
> (Emphasis added.)

[102] In *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, at pp 65–66, the COA adopted the following passage from the Indian case, namely, *Satyadhyan Ghosel & Ors v Sint Deorajin Dobi and another* AIR 1960 SC 941:

> The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> > *The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.*
>
> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit (see *Peareth v Marriott* (1883) 22 Ch D 182, *Hook v Administrator-General of Bengal & Ors* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v Tan Yew Ghee and Another* [1936] MLJ 141 at pp 147–151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication (see *Louis Dreyfus v Aruna Chalayya* LR 58 IA 381). (Emphasis added.)

[103] In my view, all matters in respect of the correctness or the validity or otherwise of the defendant's refusal to issue the *sijil* annual for the year 2002 to the plaintiff would also be res judicata, regardless of whether it was pleaded or raised in the plaintiff's OS, as long as it forms part of the matters which could

and, therefore, should have been litigated in the plaintiff's OS. This is known as res judicata 'in the wider sense' or issue estoppel.

[104] The High Court in *Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd & Ors* [1991] 2 MLJ 258 adopted the following passage from *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2) & Ors* [1967] 1 AC 853:

> The requirements of issue estoppels still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[105] In the instant case, it is clear (1) that the same question on the refusal of issuance of the *sijil* annual for the year 2002 has been decided by the High Court in the plaintiff's OS; (2) that the High Court judgment in the plaintiff's OS is final given the two COA orders dated 30 November 2009 and 12 March 2013, respectively; and (3) that the parties are clearly the same. Hence, the matters in the instant suit are res judicata (see also *Chan Tuck Seng v Chan Lee @ Chan Kong Chai & Ors* [2004] 3 MLJ 62, at p 75).

[106] Furthermore, the basic position of the plaintiff in this action remains the same as the position taken by the plaintiff in the plaintiff's OS (see *Datuk Ooi Han Eng & Anor v Soh Huang Siah (carrying on business through an organization known as Alaric's Productions Co)* [2010] 5 MLJ 665, at p 672).

[107] In that case, the COA in dismissing the appellant's appeal held as follows at p 672:

> [14] However, it is submitted by learned counsel for the appellants/plaintiffs that the issue pertaining to ownership of the titles (Miss Tourism Malaysia and Miss Tourism International) could not have been ventilated at the originating summons action as the relief sought there was merely for an injunction. *But the pertinent question is this: why were the prayers for declarations (which are now sought in the present writ action) not sought in the earlier originating summons action? After all the basic position taken by the first plaintiff in the present writ action is the same as that taken by him in the previous originating summons action: that the titles belong to him.* When the issues could have been raised in the earlier originating summons proceeding, they ought to have been so raised by the first plaintiff in that earlier proceeding. *By reason of the principle of res judicata the first plaintiff could no longer raise the issues now in the present writ action. The principle is clearly laid down in Henderson v Henderson* (1843) 67 ER 313 *where Wigram VC said (at p 319)*:
>
> *[Where] a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident,*

omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

(Emphasis added.)

[108] If this court had accepted the plaintiff's submission and, consequently, made a finding and decision contrary to the earlier finding and decision in the OS proceedings, the finding and decision of the court would be erroneous and would, in all probability, be set aside by the COA on appeal by the defendant.

[109] This was exactly what happened in *Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeals* [2009] 5 MLJ 449, at pp 462–463, where the High Court decision which went against an earlier Federal Court decision which had conclusively decided the issue of the validity of the agreements in issue (the Farlim agreements) was set aside.

Issue (2)

[110] Even assuming for a moment, that the plaintiff did not file the plaintiff's OS and hence there was no final and binding judgment of that High Court on this court by virtue of the doctrines of res judicata and issue estoppel, in my judgment, issue (2) ought still to be decided in the affirmative in favour of the defendant and against the plaintiff.

[111] My reasons are as follows:

Circular No 19 of 2001 mandates the delivery of an accountant's report for the issue of a *sijil* annual for the year 2002.

Circular No states, inter alia, as follows:

> Unless exempted by the Bar Council under Rule 6, all members (who are Partners/Sole Proprietors) must deliver their Accountant's Reports together with their applications (see Bundle C, P4).

[112] Circular No 19 of 2001 also states that any application for an exemption must be made and supported by a statutory declaration.

[113] In my judgment, since the plaintiff did not seek for an exemption of this mandatory requirement, the plaintiff could not be exempted from delivering an accountant's report to the defendant, and the plaintiff was, therefore, required to deliver an accountant's report to the defendant in respect of her application for the *sijil* annual for the year 2002.

Issue (3)

[114] In my judgment, issue (3) ought to be decided in the negative in favour of the defendant and against the plaintiff.

[115] There was no waiver by the defendant of s 79 (1) of the Act which mandates the delivery of an accountant's report to the defendant, unless exempted by the defendant.

[116] My reasons are as follows:

[117] The plaintiff has not produced any document to support such a waiver on the defendant's part.

[118] In any event, this issue is a non-issue because it was not pleaded by the plaintiff in her SOC. It is trite law that parties are bound by their pleadings (see *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416418).

Issue (4)

[119] In my judgment, this issue ought to be decided in the negative in favour of the defendant and against the plaintiff.

[120] The court rejected the plaintiff's contention that she had a 'legitimate expectation' that she would be issued a *sijil* annual for the year 2002 based on the previous issue by the defendant to her of the *sijil* annual for the years 1999, 2000 and 2001 upon her applications and without the delivery of an accountant's report.

[121] My reasons are as follows:

[122] Firstly, this was an issue that had formed part of the decision in the plaintiff's OS proceedings. Hence, the doctrines of res judicata and issue estoppel were applicable to bar her from raising the same issue in the plaintiff's present suit against the defendant.

[123] Be that as it may, it is trite law that whether or not the doctrine of legitimate expectation applies depends on the facts of each case and it cannot and should not override the express statutory power vested in an authority or a body as it would be contrary to public policy (see *North East Plantations Sdn Bhd v Pentadbir Tanah Daerah Dungun & Anor* [2011] 2 CLJ 392 (CA) and *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729 (FC)).

[124] On the facts of the present case, in my judgment, it would be contrary to public policy to allow the plaintiff to raise the doctrine of legitimate expectation against the defendant as the latter was exercising a statutory power ie discretion, which was expressly conferred upon it by the Act ie s 79(1), and the subsidiary legislation made thereunder ie r 4, 4(i) and 6(1) of the ARR, when the defendant required the plaintiff to deliver an accountant's report for her application for the *sijil* annual for the year 2002 and the year 2006 and when the defendant refused to issue to the plaintiff the *sijil* annual for the year 2002.

[125] Section 32 of the Act states as follows:

Section 32 Issues of Sijil Annual

(1) Subject to this section and sections 33 and 34, the Bar council shall at any time after the month of June in the preceding year issue a Sijil Annual to an advocate and solicitor within twenty-one days of the receipt of an application under submission (2) if:

(a) the Bar Council is satisfied that the application complies with that subsection and any rules made under this section;

(b) the Bar Council is satisfied that the applicant is not prohibited from holding a practising certificate under section 30;

(c) *the advocate and solicitor has delivered or is exempted from delivering an accountant's report in accordance with section 79*;

(d) the advocate and solicitor is not in arrears in respect of any contribution to the Compensation Fund, or of any subscription or levy lawfully due to the Bar Council or his state Bar Committee under this Act; and

(e) the advocate and solicitor intends to practise under an approved name.

(2) An application by an advocate and solicitor for a Sijil Annual shall be made in such form or forms as may be prescribed by and in accordance with rules made under this section and shall be accompanied by appropriate certificates showing that subsection (1) (d) has been complied with.

(3) Disciplinary proceedings may be taken against any advocate and solicitor if in, or in relation to, an application under this section he makes a false statement material to the application.

(4) Subject to this Act, the Bar Council may make rules regulating the issue of Sijil Annual.

(5) Any rules made by the Bar Council under this section shall be signed by the Chairman of the Bar Council.

(Emphasis added.)

[126] Section 79 of the Act states as follows:

Section 79 Advocate and Solicitor to deliver accountant's report

(1) *Every advocate and solicitor shall, unless exempted by the Bar Council, deliver to the Secretary of the Malaysian Bar with every application made by him for a Sijil Annual a report signed by an accountant, referred to as an 'accountant's report' in this section.*

(2) The accountant's report shall:

(a) state that the accountant in compliance with this section and any rules made there under has examined the books, accounts and documents of the firm of the advocate and solicitor for such accounting period as may be specified in the report;

(b) state whether or not the accountant is satisfied, from his examination of the books, accounts and documents produced to him and from the information and explanations given to him, that during the said accounting period the advocate and solicitor or his firm has complied with any rules made under subsection 78(1);

(c) state, if the accountant is not satisfied, the matters in respect of which he is not so satisfied;

(d) contain such information as may be prescribed by rules made by the Bar Council under this section; and

(e) be delivered to the Secretary of the Malaysian Bar not more than twelve months (or such other period as may be prescribed by rules made under this section) after the end of the accounting period specified in the report.

(3) Subject to any rules made under this section, the accounting period for the purposes of an accountant's report shall:

(a) begin at the expiry of the last preceding accounting period for which an accountant's report has been delivered or from the date the advocate and solicitor commenced practice, as the case may be;

(b) cover not less than twelve months;

(c) terminate not more than twelve months before the date on which the report is delivered to the Bar Council; and

(d) where possible, consistent with paragraphs (a), (b) and (c) , correspond to a period or consecutive periods for which the accounts of the advocate and solicitor or his firm are ordinarily made up.

(4) In this section 'accountant' means an approved company auditor as defined in the Companies Act 1965 [Act125]. If in any particular case there shall not be an approved company auditor practising in the State in which an advocate and solicitor ordinarily practises and the Bar Council shall be of the view that by reason of the difficulty or expense involved in

A securing the services of an approved company auditor from outside such State it would be unreasonable to expect the advocate and solicitor to secure his service, the Bar Council may approve any other auditor whom it shall consider competent for the purposes of this section.

B (5) The Bar Council shall make rules to give effect to this section and without prejudice to the generality of the foregoing such rules shall prescribe the nature and extent of the examination to be made by the accountant of the books and accounts of the firm of an advocate and solicitor and of any other relevant documents with a view to the preparation of the report to be delivered by the advocate and solicitor under this section.

C (6) Any such rules may include provisions for:

(a) permitting in any special circumstances as may be defined in the rules a different accounting period from that specified in subsection (3); and

D (b) regulating any matters of procedure or matters incidental, ancillary or supplemental to this section.

(7) Any rules made by the Bar Council under this section shall not come into operation until they have been published in the *Gazette*.

E (8) Any advocate and solicitor who fails to comply with this section or any rules made thereunder may be liable to disciplinary proceedings.

(Emphasis added.)

F **[127]** Rule 4 of the ARR provides that in preparing the accountant's report, the accountant shall *ascertain from the solicitor particulars of all bank accounts (excluding trust bank accounts) kept, maintained or operated by the solicitor in connection with his practice at any time during the accounting period to which his report relates*. (Emphasis added.)

G **[128]** Sub-rule (1) of rr 4 and para (i) of sub (1) further states that the accountant shall *make the following examination of the books, accounts and other relevant documents of the solicitor:*

H (i) *Peruse such office ledger and cash accounts and bank statements as the solicitor maintains with a view to ascertaining whether any client's money has not been paid into a client account*. (Emphasis added.)

I **[129]** The court noted that DW1 had said that these provisions meant that the accountant must also check the office account to verify whether any client's money has been paid wrongly into the office account or to verify whether or not there could have been a client's account (see p 72, lines 12–15 of the notes of proceedings).

[130] Hence, the court accepted the defendant's submission that there is a proper basis to the defendant's requirement for the delivery of an accountant's report by an applicant (irrespective of whether partner or sole proprietor) in order to confirm whether or not the applicant had maintained a client's account and also whether or not there were monies placed in the office account which truly should be placed in the client account.

[131] DW1 also said that where a prospective applicant (such as the plaintiff) had not maintained a client account for the relevant period, the prospective applicant is still required to tender an accountant's report certifying that he or she had not maintained a client account for the relevant period (see p 90, lines 39–40 of the notes of proceedings).

[132] In my judgment, in the circumstances of the instant case, the defendant had exercised its discretion properly in refusing to issue the *sijil* annual for the year 2002 to the plaintiff.

[133] It was undisputed that the plaintiff did not deliver an accountant's report for her application for the *sijil* annual for the year 2002. It was also undisputed that the plaintiff refused to submit an accountant's report at all times. Furthermore, the plaintiff also did not make any application for an exemption from being required to produce an accountant's report/certificate.

[134] In considering an application for an exemption, the defendant has considerable discretion.

[135] In *Kasinathar Balendra Thuraisingam v Majlis Peguam Malaysia* [2001] MLJU 415; [2001] 4 CLJ 160, KC Vohrah J (later JCA) held as follows at p 167:

> I do not see how the High Court in its own original jurisdiction can reach a conclusion that the plaintiff should be exempted from producing an accountant's report for the relevant period and override the Bar Council's discretion in refusing to grant the plaintiff exemption from delivering to the registrar an accountant's report and its refusal to grant the *sijil* annual for the years 1999 and 2000.
>
> The plaintiff would need to produce the report for the relevant period and it will be up to the Bar Council to consider it.

[136] If an applicant should fail to observe the necessary guidelines, rules and regulations in renewing his or her *sijil* annual, the defendant would be entitled to reject the application to renew.

[137] The Supreme Court in the locus classicus of *Yip Shou Shan v Majlis Peguam* [1994] 3 MLJ 82; [1994] 3 CLJ 150 held as follows at pp 88 (MLJ);

151 (CLJ):

> [2] If the Bar Council finds that an advocate and solicitor has failed to keep proper accounts of all moneys received by his firm and therefore he cannot deliver a clean accountant's report, the Bar Council is entitled to refuse to issue a *sijil* annual and consequently will not recommend to the registrar for the issuance of a practising certificate to the advocate and solicitor concerned.
>
> [3] It is, therefore, clearly misconceived to interpret the role of the Bar Council as merely a rubber-stamping process, it having no discretion to refuse to issue a *sijil* annual in circumstances where clearly it should not be issued in the public interest. To agree with the appellant's argument would render s 34 otiose in its application to s 32 of the Act, bearing in mind that s 32 is expressly subject to s 34 of the Act.
>
> [4] On the facts, the Bar Council had acted fairly in this case by refusing to issue the sijil annual to the appellant for the year 1994 as long as the appellant failed to submit an accountant's report showing that he had kept his accounts in accordance with the Solicitor's Account Rules 1978.
>
> [5] The Bar Council was also correct in refusing to give an exemption from delivery of an accountant's report under rule 6 of the Accountant's Report Rules 1978 because the appellant could not establish that his case comes within any of the matters enumerated under para (2) of rule 6 and also because the deficiency in the clients account is quite substantial, notwithstanding that no clients of the appellant's former firm had made any complaints.

Issue (5)

[138] In my judgment, this issue ought to be decided in the negative in favour of the defendant and against the plaintiff.

[139] My reasons are as follows:

[140] The court was of the view that the evidence adduced by the plaintiff was insufficient to prove that the defendant had victimised her, discriminated against her and conducted itself in an oppressive manner towards her from the year 1998 onwards until the year 2007.

[141] The court was also satisfied that the plaintiff had also failed to prove that it was the defendant who had wrongfully, with mala fides and without bona fide, refused to issue to her the *sijil* annual for the years 2002–2007 and that the defendant's refusal was pre-meditated, deliberate and a witch hunt.

[142] It is trite that he who asserts bad faith bears the burden of proving it (see

Yeap Seok Pen v Government of the State of Kelantan [1986] 1 MLJ 449, at p 453).

[143] In that case, Lord Griffiths in delivering the judgment of the judicial committee of the Privy Council held as follows at p 453:

> This passage puts his earlier observations in context and shows that the Lord Justice did not intend to cast doubt upon *the burden that lay upon him who asserted bad faith to at least establish a prima facie case. This is the correct approach. He who asserts bad faith has the burden of proving it, mere suspicion is not enough*. In deciding whether the burden is discharged, the court will consider all the evidence before it, including any explanation given by the Minister and any inference to be drawn from the failure to give an explanation. Their Lordships can see no reason to suppose that this was not the approach adopted in the Federal Court.
>
> (Emphasis added.)

[144] The court found DW1 to be an honest and credible witness as his evidence was consistent throughout and was supported by the contemporaneous documentary evidence and events which occurred at the material times.

[145] With regard to the plaintiff's dissatisfaction and unhappiness with the defendant's letter dated 4 February 2002 (see p 33, Bundle E), the court found the explanation given by DW1 for its issue by the defendant to the plaintiff to be good and reasonable. DW1 had explained that it was a standard letter issued by the defendant towards the members of the Malaysian Bar ('members') who were practicing without a valid practicing certificate (see D3, Q&A 32, p 25).

[146] Hence, the court accepted DW1's explanation.

[147] DW1 had also stated that for all members who have not been issued with the *sijil* annual for a particular year, another department will look at their applications and will, as a matter of course, issue such a letter to each of them.

[148] The plaintiff has not substantiated her allegation that she was victimised by the defendant in that she was the only member who received such a letter, by calling any other member or members to testify (in support of her pleaded case) that despite not having applied for the *sijil* annual for a particular year, he/she or they never received such a letter from the defendant. Neither has she called such a witness or witnesses to rebut DW1's evidence that the letter was a standard letter and its issue was a standard practice of the defendant.

[149] Based on the observation of the court and upon due consideration of the evidence of the plaintiff herself ('PW1') and that of DW1 the court formed

A the impression that the plaintiff was a very sensitive person and had, consequently, taken the letter too seriously and had over-reacted to the contents of the letter without knowing or realising that it was just a standard letter issued in the normal course of the defendant's duty as a standard practice to maintain the good name of the legal profession and to ensure that members B are diligent in securing their *sijil* annual on time in order not to be caught off guard practicing illegally without a *sijil* annual.

[150] Hence, the court found that there was no cogent evidence adduced by the plaintiff to prove that the defendant was actuated by mala fide or malice in C issuing out the letter or that there existed the intention or pre-meditation on the part of the defendant to injure the good reputation of the plaintiff as a barrister and an advocate and solicitor by issuing the letter to her, as alleged by her.

D

[151] Since the plaintiff did not call or subpoena the two persons named in para 11 of her SOC ie Cik Nor Azmar Hanim bt Mokhtar and Tuan Hj Kuthubul Zaman Bukhari to substantiate her allegations therein as mentioned earlier in this judgment under the heading 'Background' the result is that her allegations remain unproven and merely amount to mere suspicion on her part. E It is trite that suspicion can never be a substitute for proof by way of cogent evidence.

[152] In any event, the court was of the view, that DW1 had sufficiently refuted the plaintiff's assertions by stating that he was unaware of any mala fide F on the part of Cik Nor Azmar Hanim bt Mokhtar and Tuan Hj Kuthubul Zaman Bukhari (see D3, Q&A 36, p 28) as the burden of proving the truth of the plaintiff's assertions is clearly on her (see ss 101 and 102 of the Evidence Act 1950).

G

[153] The plaintiff had also stated that she was aware of certain members who were practitioners who had not delivered an accountant's report for the year 2002 but were still issued the *sijil* annual by the defendant in order to prove her allegation that she was treated unfairly and was victimised by the defendant (see H NOP, p 30, lines 24–44; NOP, p 31, lines 1–15).

[154] However, the court had to disregard her evidence to that effect as it amounted to mere hearsay since she did not call any of them to testify to that effect to substantiate her allegation.

I

[155] In any event, DW1 had refuted her allegation by tendering two accountant's certificates/reports delivered by two practitioners for their applications for the renewal of their *sijil* annual who did not have any client account.

[156] Therefore, the court was satisfied that there was no material evidence adduced by the plaintiff to show or prove that the defendant lacked bona fides, had acted in bad faith or with any improper or illegal motive in dealing with the plaintiff's respective applications for the *sijil* annual. On the contrary, based on the evidence adduced before the court, the court was of the view that the defendant was acting well within its powers in refusing to issue the *sijil* annual to the plaintiff for the years 2002 and 2006 and in not issuing to the plaintiff the *sijil* annual for years 2003, 2004 and 2005 (see *Fauziah Khanom bt Irshad Ali Khan v Pegawai Pejabat Pelajaran Daerah Johor Bahru & Ors* [2013] 7 MLJ 737).

[157] This is because the delivery of the accountant's report was a mandatory requirement and was applicable equally to all members pursuant to the ARR, the Act and the defendant's guidelines. The court did not doubt and had no reason to doubt DW1's evidence that had any other member failed to produce his/her accountant's report as per the requirement, without obtaining an exemption from that requirement, his/her application for the *sijil* annual would have been similarly refused or rejected by the defendant.

[158] The court also accepted DW1's evidence that there was no reason, let alone a good reason, advanced by the plaintiff as to why the defendant and its secretariat would single out the plaintiff and victimise her in the manner alleged by the plaintiff. This is because it was undisputed that they were dealing with numerous applications from all members, who were practitioners, and who were desirous of obtaining their *sijil* annual at the material times.

[159] Therefore, in my view, the plaintiff's allegation remained a bare allegation devoid of any substance and must, consequently, be rejected.

[160] In any event, the issue of bad faith, etc surrounding the non-issuance of the *sijil* annual for the year 2002 to the plaintiff had already been raised by the plaintiff in the plaintiff's OS and decided upon by that High Court. Even if she had accidentally or inadvertently overlooked to raise it in her OS, it is fatal to her claim in this suit because she should have raised it then. Hence, the issue is res judicata and the plaintiff's attempt in this suit to raise it again must necessarily fail (see *Datuk Ooi Han Eng & Anor v Soh Huang Siah (carrying on business through an organization known as Alaric's Productions Co)*).

[161] The court also rejected the plaintiff's contention that the mandatory requirement concerning the accountant's report/certificate was never made known to the plaintiff.

[162] My reasons are as follows:

[163] Firstly, it is beyond doubt that the plaintiff had full knowledge of the defendant's requirement of an accountant's report/certificate. Had the plaintiff provided the same instead of proceeding with her OS in the year 2002, the *sijil* annual for the year 2002 would have been duly issued to the plaintiff.

[164] By commencing the OS proceedings against the defendant, the plaintiff must be taken to have known the reason for the non-issue of the *sijil* annual by the defendant. It is incredulous for the plaintiff, to now suggest that the plaintiff did not know about the accountant's certificate/report and that this had affected her and had caused her to suffer loss and damage because she could not practice her profession.

[165] She clearly knew about the need to provide the accountant's certificate/report in the year 2002 but she had chosen not to do so as she had insisted on holding onto her view, understanding and/or interpretation that there was no necessity for her to do so as she did not have a client account.

[166] Secondly, the defendant had already testified through DW1, and this testimony being unchallenged was accepted by the court, that in respect of Circular No 17 of 2002 for the issuance of the *sijil* annual for the year 2003, it was 'clarified for those who have not maintained a client account (that they) should also obtain a certificate from an accountant'.

[167] DW1 further disagreed with the plaintiff's suggestion that Circular No 17 of 2002 had made a new ruling concerning the mandatory requirement of the accountant's certificate/report.

[168] He testified categorically as follows:

> the requirement for an Accountant's certificate is already there in Circular 19/2002 as can be seen from item 7, the difference in respect of circular 17/2002 is they clarified for those who have not maintained client's account should also obtain a certificate from an accountant.

[169] On the plaintiff's allegation of ultra vires, the court agreed with and accepted the defendant's submission that the plaintiff's contention was wholly misconceived.

[170] My reasons are as follows:

[171] Rule 16 of the SAR mentions 'requirement' as opposed to any 'letter or notification' by the defendant. In my judgment, the letters raised by the plaintiff which were sent out by the defendant did not come within the meaning of the word 'requirement' in r 16.

[172] With regard to r 8 of the ARR, in my judgment, it applies only to notices issued under the ARR. However, in my judgment, the letters sent out by the defendant in the instant case were not letters sent out by the defendant under the ARR because they related to the issuance of the *sijil* annual by the defendant.

[173] In any event, the plaintiff's allegation of ultra vires was only made in para 8 of the plaintiff's claim which states as follows:

> Surat Defendan tersebut telah dibuktikan bukan sahaja sebagai suatu rekaan, tetapi juga sebagai ultra vires.

[174] There is only one letter which is relevant. It is the letter dated 26 November 2001.

[175] My reasons are as follows:

(a) firstly, the plaintiff has no basis to complain about the letters other than the letter dated 26 November 2001 as the other letters are not pleaded in the plaintiff's SOC;

(b) secondly, nothing turned upon this letter as the plaintiff had already known that the plaintiff had to submit an accountant's report pursuant to Circular 19 of 2001. The issue was whether the defendant was entitled to refuse to issue to the plaintiff the *sijil* annual for the year 2002 for the lack of delivery of an accountant's report by the plaintiff, and the High Court in the plaintiff's OS proceedings had conclusively decided this issue, affirmatively, in favour of the defendant and against the plaintiff; and

(c) thirdly, the doctrines of res judicata and issue estoppel were applicable against the plaintiff because the letter dated 26 November 2001 was exhibited in the plaintiff's OS proceedings (see p 21, para 9, Bundle E) and the plaintiff had in fact raised the same argument in her OS proceedings (see pp 21, 70, 71, Bundle E).

Issue (6)

[176] In my judgment, this issue ought to be decided in the negative in favour of the defendant and against the plaintiff.

[177] My reasons are as follows:

[178] The plaintiff's assertions in her submissions that the defendant had acted wrongfully when it refused to issue the *sijil* annual for the year 2002 to her were bare allegations made without any evidence in support thereof. It is

A trite that pursuant to s 101 and s 102 of the Evidence Act 1950 the plaintiff bears the burden of proving her assertions on a balance of probability. It is not for the defendant to disprove her assertions. Based on the evidence before the court, the court was satisfied that the plaintiff had clearly failed to prove her assertions on a balance of probability.

B

[179] The defendant has testified that the OS initiated by the defendant against the plaintiff was the 'usual course of action taken if a member continued to practice without a valid Practicing Certificate' (see D3, Q&A 36).

C **[180]** Hence, any grievance on the plaintiff's part resulting from the commencement by the defendant of the defendant's OS against the plaintiff ought to have been addressed in the defendant's OS proceedings and not in this suit.

D **[181]** Section 99 of the Act empowers the Advocates & Solicitors' Disciplinary Board to act on complaints against an advocate and solicitor, and this provision provides an avenue for the plaintiff to raise all the relevant matters including the lack of basis, etc, for the non-issue by the defendant to her of the *sijil* annual for the year 2002.

E

Issue (7)

[182] In my judgment, this issue ought to be decided in the negative in favour of the defendant and against the plaintiff.

F

[183] My reasons are as follows:

[184] The defendant's proven case has been that the plaintiff did not make any G application in respect of *sijil* annual for the years 2003, 2004 and 2005. This is not disputed by the plaintiff. In fact, the plaintiff had conceded during the full trial that no application was made by her. This is apparent when the plaintiff attempted to explain why no application was made by her for those years.

H **[185]** The court rejected the plaintiff's submissions to the contrary because they contained assertions of fact which must be pleaded in her SOC before she can be allowed to prove them in the full trial by the production of evidence, oral and/or documentary for the consideration of the court.

I **[186]** The court also noted that the letters referred to by the plaintiff in the relevant paragraphs in her written submissions did not amount to applications under the Act. The said letters also did not excuse the plaintiff from making a proper application for the *sijil* annual for each of those three years. It was incumbent upon the plaintiff to apply to the defendant for the issue to her of

the *sijil* annual for each of those three years. A

[187] Therefore, there can be no refusal on the part of the defendant to issue to the plaintiff the *sijil* annual for those three years, let alone wrongful refusal, simply because there was no application, let alone a proper application, which was made by the plaintiff to that effect. The plaintiff's conduct, ipso facto, renders there being no wrong done on the part of the defendant to the plaintiff. B

[188] In my judgment, for each alleged wrongful refusal on the part of the defendant to issue the plaintiff with a *sijil* annual for a particular year, it is incumbent on the plaintiff to institute proceedings under s 34 of the Act to challenge the defendant's refusal (see *Yip Shou Shan v Majlis Peguam* [1994] 2 MLJ 82; [1994] 3 CLJ 150). C

[189] In relation to the year 2006, contrary to the plaintiff's averment in para 14.2 of her SOC, the plaintiff had clarified in her evidence given during the full trial that the letter dated 27 July 2006 was an application by her for the *sijil* annual for the year 2006, and not for the year 2007 as pleaded. D

[190] However, unfortunately, for the plaintiff, her application could not be approved by the defendant because it was not proper as it was not complete. The defendant had requested the plaintiff to provide the defendant with the necessary documents to complete her application but the defendant never received the same from the plaintiff (see p 101, Bundle C; Q&A 27 and 29, D3). E F

[191] The court found that although the plaintiff had contended that the requirement of a fresh statutory declaration by the defendant was misconceived and without any basis, nevertheless, the plaintiff did in fact provide the required statutory declaration for her application for the *sijil* annual for the year 2007. As a result thereof, the plaintiff's application was duly approved by the defendant under the Act and she was duly issued with the *sijil* annual for the year 2007. G

[192] The court also found that there was no merit to the issue raised by the plaintiff in her submission concerning the late issuance to the plaintiff of the sijil annual for the year 2007 by the defendant, as the application was only made by the plaintiff in late November 2007, and not earlier, contrary to her pleaded case. H I

[193] Therefore, there was no basis at all for the plaintiff to have alleged any wrongful act or failure on the part of the defendant in relation to the issuance or otherwise by the defendant of the *sijil* annual to the plaintiff for the years 2003–2007 ie a period of five years.

Issue (8)

[194] In my judgment, even assuming for a moment that the plaintiff has succeeded in proving her claims against the defendant on liability ie the defendant had acted wrongfully in refusing to issue to her the *sijil* annual for the years concerned, this issue ought to be decided in the negative in favour of the defendant and against the plaintiff.

[195] My reasons are as follows:

[196] Firstly, no particulars of loss were pleaded in the plaintiff's SOC and the same was not raised or established during the course of the full trial.

[197] Secondly, the plaintiff has not adduced sufficient evidence to prove the loss, if any, suffered or incurred by her. It is trite that it is for the plaintiff to prove special damages with precise evidence. The plaintiff must prove her actual loss. The plaintiff must prove the fact and the quantum of her loss. If she fails to do so her action must fail. Self-serving statements by the plaintiff have no probative value, unless supported by tangible evidence from independent witnesses.

[198] In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133 the court held as follows:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

[199] In my judgment, based on the evidence before the court, the plaintiff has failed to prove the fact of the alleged losses and the amount of the alleged losses suffered by her. She has not called any witness to support her evidence as to the anxiety and distress suffered by her or to adduce any documentary evidence to show her loss of income as a result of the wrongful refusal of the defendant to issue to her the *sijil* annual for the year 2002 and for the subsequent four years ie 2003–2006.

[200] It is trite that a document and its contents must be proved by the production of the document itself and not by oral testimony (see s 62 of the Evidence Act 1950). In the absence of the document itself, or of evidence to show why it could not be produced, all secondary evidence of its contents, whether in other documents or oral testimony, must be rejected (see s 64 and s 65 of the Evidence Act 1950). The plaintiff has, therefore, fallen short of the legal requirement to prove her loss by failing to tender the necessary evidence to

substantiate her alleged loss (see *Hjh Maria @ Maryati bt Dalle (t/a Melati Kontraktor) v Majlis Perbandaran Tawau* [2012] 3 MLJ 132, at p 141).

[201] In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19, at pp 417–419 (MLJ); pp 58–59 (CLJ), the then Supreme Court speaking through Edgar Joseph Jr SCJ held as follows at p 38 (MLJ); p 58 (CLJ):

> Secondly, I would refer to what Lord Goddard said in *Bohham-Carter v Hyde Park Hotel Ltd* [1984] 64 TLR 177 at 178:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.
>
> Thirdly, on the quality of evidence expected of a plaintiff, it is necessary to remember what Devlin J (as he then was) said in *Biggin Co v Permanite* [1951] 1 KB 422 at 438, namely, that where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can. Nevertheless, it remains true to say that generally difficulty of proof does not dispense with the necessity for proof (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 AER 788 at p 796 per Atkinson J) The case of *Ashcroft v Curtin* [1971] 1 WLR 1713 illustrates this point for there the plaintiff claiming for diminution of profits of his one-man business failed in his claim despite the evidence pointing to a decrease in the company's profitability due to the injury, the records relied on being too rudimentary and the accounts too unreliable to quantify the loss.

And at follows at p 419 (MLJ); p 59 (CLJ):

> In other words, what I am saying is that *a plaintiff's unsupported assertion that he would receive such and such a price for his fruits or vegetables does not prove market value* much less that he had a market. *It must be proved aliunde* — that is to say, in order to prove that a plaintiff would have got such and such a price for the fruits or vegetables, *the natural thing to do would be to call the man who would have paid the price*.
>
> (Emphasis added.)

[202] In any event, it is trite that a plaintiff has a duty to mitigate any loss allegedly suffered or incurred by him/her. The same principle of law applies to the plaintiff in the instant case. She is not expected to sit idly by folding her arms and wait to be compensated in full by the defendant, in the event, she ultimately succeeds in her action against the defendant.

[203] Thirdly, as the plaintiff has not pleaded in her SOC that exemplary damages as claimed by her in para 18 of her SOC and general damages for anxiety, distress and loss of self-esteem, as claimed by her in para 19(3), are to be assessed by the court, her claim under this head must necessarily fail.

A CONCLUSION

[204] Based on the reasons as set out above, the court was satisfied that the plaintiff has not discharged her burden of proof on the balance of probability. Hence, the action against the defendant could not succeed and the plaintiff was, consequently, not entitled to any of the reliefs or damages claimed by her in paras 18 and 19 of her SOC.

[205] In the premises, the court dismissed the plaintiff's claim with no order as to costs as the defendant had informed the court that it was not seeking an order of costs against the plaintiff.

Claim dismissed.

Reported by Ashok Kumar